72-233

FILED
AUG 10 1972
MICHAEL RODAK, JR., CLERK

UNITED STATES SUPREME COURT.

NO. 72-233

WRIT OF CERTIORARI

HYMAN LEBMAN

VERSUS

UNITED STATES OF AMERICA

HYMAN LEBMAN
111 SO. FLORES ST.
SAN ANTONIO, TEXAS.

IN THE

UNITED STATES SUPREME COURT

NO.

Hyman Lebman
Petitioner

versus

UNITED STATES OF AMERICA
Plaintiff.

PETITION FOR A WRIT OF CERTIORARI

TO UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Hyman Lebman, Petitioner prays that a writ of certiorari issue to review the judgments and decisions of the United States Court of Appeals Fifth Circuit which confirmed a conviction of petitioner of violation of the statue 18 U.S.C. 922 (b)(3); 18 U.S.C. 922 (b)(5) and 18 U.S.C. 922 (m) in the District Court of the United States for the Western District of Texas in San Antonio, Texas, Number SA-70-Cr-155 on the 21st day of June 1971. App. 1

On appeal to the United States Court of Appeals, Fifth Circuit, conviction was upheld on June 2nd, 1972 and motion by petitioner for a rehearing was denied July 13th, 1972 in Number 71-2281 App. 2.

The Government claims for its authority Article 1, Section 8, Clause 3 of the Constitution, known as the Comm erce Clause and thereby assumes the burden of proving nexus to interstate commerce, which they failed to do.

In this case, petitioner must rely on his records (details of a transaction that occurred in Feb. of 1969 would be hard to remember in June of 1971) and the record, #140 of form 4473 App.3 show that Joe Galvan (in his statement read in Court, he states another person was with him) App.4 came to the store and advised he wished to purchase a gun, the record shows it was a Colt Cobra #253496, 38 Cal.

Normal proceedure is, after price is agreed upon, the purchaser produces identification material, genemally his driver's license, which Galvan did and from this Lebman entered into form 4473 his name, address, age and other items necessary to show he is a resident of Texas. Galvan is then required to answer the questions therein of form 4473 which verified he was a qualified purchaser and then Galvan signed the form after which Lebman certified his belief he was correctly and legally making the sale.

Then the general proceedure is that Lebman wraps up the firearm, lays it on the counter, receives pay-for same and purchaser takes possession of item purchased and leaves.

This all took place at Lebman's place of business in San Antonio, Texas and Lebman states that

prior to that time he never knew Joe Galvan and neither then nor now does he know the man Galvan states was with him.

The question before the Court is how, by any stretch of the imagination can this transaction which began and ended in Lebman's place of business in San Antonio, Texas be classified as being in interstate commerce.

Petitioner gave notice of appeal prior to plea of guilty to the three charges listed and the Government introduced and read to the Court its testimony consisting of a written statement by Joe Galvan. App.5

From this statement it can be clearly seen: There was no intent by Lebman to violate any law.

That the origination of the purchase was made between Galvan and his friend at Galvan's place of employment.

Neither the Government nor Galvan would or could name the friend nor was he present in Court.

No interstate commerce being proven, it follws the Government lacked authority and the Court jurisdiction in this purely intrastate transaction.

Both, the District and Appeals Court were in complete variance with the ruling of the Supreme Court in Bass and Rewis, App.5.

In Bass, while a difference of statue was involved, the Supreme Court indicated its doubt as to the constitionality of the case under the commerce clause, ahd the government rested its case thereon.

In Rewis, the Supreme Court admonished the lower courts as to extending the power of the Government under the interstste commerce clause to the point that Feralism was involved in the air we breath and the water we drink.

This also was the concern of Congress where in publication 603 (12-68) under published ordinances on firearms, Congress goes to extremes to state, under purposes and definitions in 921 under section 2 of definitions (but such term does not include commerce between places within the same State but throught any place outside of that State).

It has been often held that criminal sanctions shall not apply when a conviction is made, without showing intent. The Government's witness statement shows conclusively there was no intent to violate any statue by Lebman. Under these circumstances, the penalties imposed were in violation of Article VIII of the constitution.

All things considered, petitioner prays his writ for certorari be issued so that justice may prevail.

Hyman Lebman,
Petitioner.
Hyman Lebman

Hyman Lebman
111 So. Flores St.
San Antonio, Texas.

APPENDIX

Decision of the District Court in No. SA-70-Cr-155 on June 21st, 1971.

The Court--All right. The Court finds a factual basis, determines that there is a factual basis to support your plea of guilty as to Count, One, Count Two and Count Three and accordingly enters judgment of conviction on each of the counts and finds you guilty on each of the counts.

Lets see now about the sentencing procedure, today is the 21st, since you are going to file a montion in arrest of Judgment, Counsel, I will just set the sentencing for the 29th at two o'clock in the afternoon and I will hear the motion in arreat of judment at the same time.

Defendant's Motion in arrest of Judgment.

Count 1 of the indictment does not state an offense.
Count 11 of the indictment does not state an offense.
Count 111 of the indictment does not state an offense.

This Court does not have jurisdiction.

This motion was over ruled by this Court and upheld by the Fifth Court of Appeals.

The sentence of the Court was:
$500 fine on each count for a total of $1,500.00. 12 Months on each count 2 and 3 to run concurrently with Count 1.
The term of imprisonment was suspended.
Defendant was placed on probation for (5) five years without supervision.
Fine to be paid within 30 days after judgment becomes final in the Court of Appeals.

Statement by Joe Galvan, read in Court.

Joe Galvan, who when introuced as a witness would testify that his name is Jose Galvan, that he is fifty seven years of age, that he is known by the name of Joe Galvan and lives in San Antonio, Texas, that he signed a form, a Firearms Transaction Record, being Number 140, in San Antonio, Texas on February 19, 1969.

On that occasion a friend of his from Mexico City whose name he did not recall came to his place of employment, Luchessee Boot Company, in San Antonio, that this man told him that he had found a hand gun that he wanted to by at Lebman's Hardware on South Flores in San Antonio, Texas, but that the man a Lebman's had told him that he could only sell a gun if a Texas resident signed for it, that Mr. Galvan went to Lebman's Hardware Store and that the elder Mr. Lebman, who is the defendant in this particular plea, handled the transaction, that this defendant received the purchase money from the man from Mexico, and gave the man from Mexico the pistol, that this Mr. Jose Galvan or Joe Galvan did sign for the pistol for the benefit of the man from Mexico, that he received no compensation therefor, that subsequent thereto the form 140 was filled in by this defendant, as it shows on the face of the instrument, and signed by Jose Galvan, dated 2/19/69, that it contains the description of the Cobra pistol, serial number 253496, it has the description of Mr. Galvan as to place of birth, weight, heigh, color, race, date of birth, it has Mr. Galvan's signature upon it and the license number of his driver's license.

The findings of the District Court and Appeals Court are in variance with the Supreme Court holdings in both Rewis and Bass.

In Rewis, the Supreme Court admonished lower courts against making Federal cases out of situations that could well be handled by the State Courts.

In Bass, which is under the same law but different statue, the Court has held when reliance on the Commerce Clause is made, it is incumbent on the Government to prove in each case interstate commerce and as in Bass, the Government attempts to side track this issue thru other charges.

This has been refuted by the Supreme Court and this case parralel's Bass on this issue.

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Supreme Court, U. S.
FILED
AUG 10 1972
MICHAEL RODAK, JR., CLERK

APPENDIX 11

LEBMAN

V

UNITED STATES

NO. 72-233

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19 71

No. 71-2281

FILED

JUL 17 1972

D. C. Docket No. SA 70 CR 155

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HYMAN LERMAN,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas

Before WISDOM, GOLDBERG and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 2, 1972

CLARK, Circuit Judge, concurring specially.

Issued as Mandate: JUL 13 1972

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By Claudette Steiger
Deputy
New Orleans, Louisiana

FOR THE FIFTH CIRCUIT

COURT OF APPEALS
FILED
JUL 5 1972
EDWARD W. WADSWORTH
CLERK

No. 71-2281

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HYMAN LEBMAN,

Defendant-Appellant.

- - - - -

Appeal from the United States District Court for the Western District of Texas.

- - - - -

July 5, 1972

Before WISDOM, GOLDBERG and CLARK, Circuit Judges.

BY THE COURT:

IT IS ORDERED that Appellant's motion for leave to file a petition for rehearing out of time in the above cause is hereby granted.

The motion for a rehearing is denied.

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CC

FILED

JUL 5 1972

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

FILED
JUL 17 1972
DAN W. DEDRICK, CLERK

No. 71-2281

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HYMAN LEBMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

(June 2, 1972)

Before WISDOM, GOLDBERG, and CLARK
Circuit Judges.

WISDOM, Circuit Judge: Hyman Lebman appeals from his judgment of conviction entered upon a guilty plea to three counts of violations of 18 U.S.C. §§ 922 (b) (3), 922 (b) (5), and 922 (m), provisions of the Gun Control Act of 1968. We affirm.

On September 11, 1970, a federal grand jury returned an indictment against Lebman and two others charg-

ing seventeen counts of violations of Chapter 44, title 18, United States Code, 18 U.S.C. §§921-928, and one count of conspiracy, 18 U.S.C. 371. Lebman was named in the first ten substantive counts and in the conspiracy count. Lebman entered a guilty plea on the first three substantive counts. The counts, all arising from the same transaction, charged Lebman with (1) aiding and abetting a licensed firearm dealer to sell and deliver a firearm "to a person not residing in the State of Texas whom he then and there knew and had reasonable cause to believe did not reside in the State of Texas, where such licensed firearms business was located, in violation of Section 922(b) (3), title 18, United States Code,[1] (2) aiding and abetting a licensed firearm dealer to sell and deliver a firearm "to a purchaser and to fail to note in records required to be kept pursuant to 18 U.S.C. § 923, the name, age, and place of residence of such purchaser, in violation of Section 922(b) (5), title 18, United States Code",[2] and (3) aiding

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[1] 18 U.S.C. § 922(b)(3) provides:

> It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver —
>
> . . .
>
> (3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to
>
> [exceptions not here relevant].

[2] 18 U.S.C. § 922(b)(5) provides:

> It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver —
>
> . . .

and abetting a licensed firearm dealer "to make a false entry in records kept pursuant to Section 923, Title 18, United States Code, and regulations promulgated thereunder . . . in violation of Section 922(m), title 18, United States Code".[3] Lebman's guilty plea was accepted and a judgment of conviction entered. After entry of the conviction, but prior to sentencing, Lebman filed a "Motion in Arrest of Judgment" urging grounds similar to those raised on this appeal. The motion was denied, and Lebman received a fine of five hundred dollars and a sentence of twelve months on each count to run concurrently. The sentences were suspended, and Lebman was placed on five years unsupervised probation.

On appeal, Lebman challenges the constitutionality of the statutory provisions under which he was convicted. He argues, first, that 18 U.S.C. § 922(b) (3), 922 (b) (5), and 922(m) (see footnotes 1-3) are not supported by the commerce power of Congress in that the statutes do not require the proscribed conduct to

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(5) any firearm or ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

[3] 18 U.S.C. § 922(m) provides:

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

have any relation to interstate commerce. Stated otherwise, Lebman contends that Congress may not, by criminal sanctions, regulate this intrastate transaction.

Lebman is, however, incorrect in his assertion that the power of Congress to regulate commerce under Article I, Section 8, of the Constitution does not extend to intrastate transactions. "[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze". *United States v. Women's Sportswear Mfrs. Ass'n.*, 1949, 336 U.S. 460, 464, 69 S.Ct. 714, 93 L.Ed. 805, 811.

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See M'Culloch v. Maryland, 4 Wheat. 316, 421, 4 L.Ed.2d 579, 605.

United States v. Danly, 1941, 312 U.S. 100, 118, 61 S.Ct. 451, 85 L.Ed. 609, 619. *See Gibbons v. Ogden*, 1824, 9 Wheat 1, 6 L.Ed. 23; *Labor Bd. v. Jones & Laughlin Steel Corp.*, 1937, 301 U.S. 1, 57 S.Ct. 675, 81 L.Ed. 893; *Wickard v. Filburn*, 1942, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122; *Heart of Atlanta Motel v. United States*, 1964, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed. 2d 258.

Congress, in conjunction with the passage of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968,[4] made detailed findings as to the effect of the proscribed intrastate conduct on interstate commerce.[5] These findings, when examined against the

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[4]Chapter 44, title 18, United States Code, was added by title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351. Title IV was approved on June 19, 1968, and was to become effective on December 16, 1968. The Congressional findings as to the effect on interstate commerce of the proscribed conduct were contained in § 901(a) of title IV (see footnote 5). Prior to the effective date of title IV, on October 22, 1968, Congress approved the Gun Control Act of 1968, Pub. L. 90-618. Title I of that Act, effective, October 22, 1968, amended Chapter 44, title 18 before its effective date. The Congressional findings contained in § 901 (a) were deleted as "unnecessary", by title I. *See* 3 U.S. Code Cong. & Admin. News 4410 (1968). The Congressional findings, although deleted by the amendments of title I, are relevant in assessing the constitutionality of the statutory provisions at issue in the present case. The findings apply with equal force to the statutory scheme as amended by title I as they did to the unamended version in title IV.

[5]Section 901(a) of title IV of the Omnibus Crime Control and Safe Streets Act of 1968 (see footnote 4) provides:

> (a) The Congress hereby finds and declares —
>
> (1) that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power;
>
> (2) that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States;

(3) that only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the business of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible;

(4) that the acquisition on a mail-order basis of firearms other than a rifle or shotgun by nonlicensed individuals, from a place other than their State of residence, has materially tended to thwart the effectiveness of State laws and regulations, and local ordinances;

(5) that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms;

(6) that there is a causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior, and that such firearms have been widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior;

(7) that the United States has become the dumping ground of the castoff surplus military weapons of other nations, and that such weapons, and the large volume of relatively inexpensive pistols and revolvers (largely worthless for sporting purposes), imported into the United States in recent years, has contributed greatly to lawlessness and to the Nation's law enforcement problems;

(8) that the lack of adequate Federal control over interstate and foreign commerce in highly destructive weapons (such as bazookas, antitank guns, and so forth, and destructive devices such as explosive or incendiary grenades, bombs, missiles, and so forth) has allowed such weapons and devices to fall into the hands of lawless persons, including armed groups who would supplant lawful authority, thus creating a problem of national concern;

(9) that the existing licensing system under the Federal Firearms Act does not provide adequate li-

evidentiary background upon which they were based,[6] convince us that Congress intended to and had the authority, under its commerce power, to regulate the intrastate transactions at issue here. *See Perez v. United States*, 1971, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686; *Heart of Atlanta Motel v. United States*, 1964, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258.[7] Lebman seeks to rely on *United States v. Bass*, 40 U.S.L.W. 4101 (December 21, 1971) as authority for his argument that Congress was acting beyond its commerce power if it sought, by the statutory provisions at issue here,

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cense fees or proper standards for the granting or denial of licenses, and that this has led to licenses being issued to persons not reasonably entitled thereto, thus distorting the purposes of the licensing system.

(b) The Congress further hereby declares that the purpose of this title is to cope with the conditions referred to in the foregoing subsection, and that it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.

1 U.S. Code Cong. & Admin. News 270-271 (1968).

[6] *See* U.S. Code Cong. & Admin. News 2112-2309 (1968); 3 U.S. Code Cong. & Admin. News 4410-4435.

[7] Because, as we have held, Congress could constitutionally regulate an intrastate transaction under 18 U.S.C. §§ 922(b) (3), 922 (b)(5), and 922(m), Lebman's contention that the indictment was constitutionally defective, in that it failed to allege a relationship between the proscribed transaction and interstate commerce, must fail.

to regulate intrastate transactions. In *Bass*, the defendant was convicted of possessing a firearm in violation of 18 U.S.C. § 1202(a) (app.)* He argued that Section 1202(a) required that he possess a firearm "in commerce or affecting commerce". The Court, after concluding that "the statutory materials are inconclusive on the central issue of whether or not the statutory phrase 'in commerce or affecting commerce' applies to 'possesses' and 'receives' as well as 'transports' 40 U.S.L.W. at 4104, adopted the narrower reading of the statute — "the phrase 'in commerce or affecting commerce' is part of all three offenses, and the present conviction must be set aside because the Government has failed to show the requisite nexus with interstate commerce". 40 U.S.L.W. at 4104.

In *United States v. Nelson*, 5 Cir. 1971, F.2d [No. 71-3030, March 16, 1971], this Court, in a case dealing

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* (a) Any person who —

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. (App.) § 1202(a) (Supp. V 1970).

with the constitutionality of 18 U.S.C. § 922(a) (6),* distinguished *Bass* with language equally applicable to the statutory provisions at issue in the present case.

> The instant case differs from *Bass* in several respects. First, appellant was convicted under 18 U.S.C.A. §922(a) (6) [see footnote 9] which, in contrast with § 1202(a) (1) that was at issue in *Bass*, contains no language referring to interstate commerce. The statute is thus not ambiguous on its face, unlike § 1202 (a) (1). Secondly, § 922 is part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968. The legislative history of this Title is fairly extensive and convinces us that Congress intended to reach appellant's conduct irrespective of its immediate nexus with commerce. The statutory provisions facing the Supreme Court in *Bass* is part of Title VII of the same act. The legislative history of Title VII is, as noted by the Court in *Bass*, virtually nonexistent. The Court was, therefore, left with only minimal legislative guidance. Thirdly, the

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* (a) It shall be unlawful — (6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter. 18 U.S.C. § 922(a)(6).

Congressional Declaration of Purpose set out in § 901 of the Omnibus Crime Act clearly indicates Congress' purpose to regulate the acquisition of firearms by felons without regard to the nexus of each individual acquisition with interstate commerce.

It seems clear from the language of § 922 (a) (6), from its legislative history, and from the declaration of Congressional purpose that Congress meant to regulate all sales of the types of firearms covered by the Omnibus Crime Act, not just those sales in which the Government can prove some specific connection with interstate commerce.

Moreover, we believe that acquisition of firearms is more closely related to interstate commerce than mere possession. Therefore, while the Supreme Court in *Bass* impliedly expressed some reservations about Congress' power to regulate possession of firearms, we entertain no doubt that it has the power to regulate their acquisition without requiring proof of a nexus with interstate commerce in each individual case.

See also United States v. Menna, 9 Cir. 1971, 451 F.2d 982. As in *Nelson*, §§ 922(b) (3), 922 (b) (5), and 922 (m), unlike § 1202(a), are unambiguous on their face, in that they contain no reference to interstate commerce, and are accompanied by legislative history and

a statement of purpose[10] and findings indicating a desire to reach intrastate transactions.[11] The statutory interpretation of an ambiguous statute in *Bass* does not preclude the result we reach in the present case.[12]

Assuming that Congress, as we have held, could constitutionally enact the challenged statutes under the

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[10] The principal purpose of H.R. 17735, as amended, is to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders.

3 U.S. Code Cong. & Admin. News 4411 (1968).

[11] As to the power of Congress to enact § 922(a)(6), we said in *Nelson:*

> Congress may undoubtedly impose criminal sanctions on conduct that is ostensibly intrastate. *Perez v. United States,* 91 S.Ct. 1357 (1971) (loan-sharking). We believe that the acquisition of firearms by convicted felons and persons under indictment for felonies, although arguably intrastate activity, imposes a sufficient burden upon interstate commerce to be a proper subject for federal regulation. *See* U.S. Code Cong. and Admin. News 1968, pp. 2163-66. If Congress is to effectively prevent the interstate use of guns for illegal purposes it must control their sources: manufacturers, dealers, and importers. That is what it sought to do in § 922.

[12] Lebman seeks to distinguish *Nelson* because the crime involved in that case imposes a greater burden on interstate commerce than the crime involved in the present case. Assuming, arguendo, that this is true, we still believe that the Congressional findings relevant to the statutory provisions at issue in the present case justify Congressional action under the commerce power.

Lebman's reliance on Revis v. United States, 1971, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493, is similarly misplaced. In *Revis,* as in *Bass,* the Supreme Court opted for a narrow interpretation of 18 U.S.C. § 1952 because "neither statutory language nor legislative history support . . . a broad-ranging interpretation of § 1952." 401 U.S. at 812.

commerce power and intended to reach intrastate transactions under the statutes, Lebman argues that Section 922(b) (3) (see footnote 1), the basis of count one, is constitutionally defective in other respects. Lebman argues that the statute unconstitutionally inhibits the non-resident firearms purchaser's right to travel. *See Shapiro v. Thompson*, 1969, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600.[13] Assuming, but not deciding, that Lebman has standing to raise the constitutional objection of a non-resident firearms purchaser, his argument must, nevertheless, fail. We are unable to discern any inhibition on the non-resident firearms purchaser's right to travel occasioned by a statute regulating the sale of firearms to a non-resident by a licensed dealer. Nor do we find that the distinction in Section 922(b)

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[13]In *Shapiro*, the Supreme Court said, "[W]e have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision". 394 U.S. at 630. In a footnote, the Court noted that the right to travel was grounded, in previous cases, on the Privileges and Immunities Clause of Article III, Section 2, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Due Process Clause of the Fifth Amendment. 394 U.S. at 630 fn. 8. The Privileges and Immunities Clause of the Fourteenth Amendment applies, by its terms, to the states, and, as a result, is not relevant here. The Privileges and Immunities Clause of Article IV is likewise a limitation upon the states. *See* Slaughter-Hause Cases, 1873, 83 U.S. (16 Wall) 36, 21 L.Ed. 394; Chambers v. Baltimore & Ohio R.R., 1907, 207 U.S. 142; Whitfield v. Ohio, 1936, 297 U.S. 431; Toomer v. Witsell, 1948, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460. In *Shapiro*, the Court relied on the Due Process Clause of the Fifth Amendment to strike down the District of Columbia waiting-period requirement "even though it was adopted by Congress as an exercise of federal power". 394 U.S. at 641. Lebman apparently relies on the Due Process Clause of the Fifth Amendment and its "incorporated" equal protection requirements, *see* Bolling v. Sharpe, 1954, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, as the basis for his "right to travel" challenge.

(3) between residents and non-residents is "wholly irrelevant to the achievement of [Congress's] . . . objective". *McGowan v. Maryland,* 1961, 366 U.S. 420, 425, 81 S.Ct. 1101, 6 L.Ed.2d 393, 399. This is particularly true in light of the explicit Congressional finding that "the sale or other disposition of concealable weapons . . . to non-residents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms". (*See* footnote 5).

Lebman also argues that Section 922(b) (3) is unconstitutionally vague and indefinite in that it employs the scienter requirement "knows or has reasonable cause to believe". Again assuming, but not deciding, that Lebman possesses the requisite standing to raise this contention on appeal, it was charged under the indictment, and a guilty plea was entered, that Lebman "knowingly and unlawfully did aid and abet and *wilfully cause* a firearms dealer . . . to sell and deliver a firearm . . . to a person not residing in the State of Texas whom he then and there knew *and* had reasonable cause to believe did not reside in the State of Texas. . . ." Lebman has no grounds to complain of this scienter standard under which he was charged and plead guilty. He was charged and convicted under an admittedly acceptable scienter standard providing that he "knew" the facts specified in the statute. He cannot complain when the Government chose to *add* to this acceptable scienter standard the challenged "reasonable cause to believe" standard. We, therefore,

need not and do not decide the propriety of an indictment and conviction under the "knows or has reasonable cause to believe" standard.

We have carefully examined Lebman's other arguments on appeal and find them without merit.

AFFIRMED.

CLARK, Circuit Judge, concurring specially.

I concur in all of Judge Wisdom's opinion except the penultimate paragraph.

Under this circuit's holding in *United States v. Jacobs*, 451 F.2d 530 (5th Cir. 1971), the conjunctive indictment did not increase the government's burden under the disjunctive statute to prove more than that Lebman had "reasonable cause to believe" that the person to whom he sold firearms was a nonresident of Texas. For this reason I would hold that Lebman possesses the requisite standing to mount a constitutional attack on this proviso of the act. However, I would hold the proviso to be sufficiently clear and definite to pass constitutional muster. The statute's coverage of dealers who "know" the purchaser is a nonresident is really not attacked, and rightly so. The precision of this requirement is beyond cavil. The alternative incrimination of those who have "reasonable cause to believe" he to whom they sell is a nonresident does not, in the language of the Supreme Court, fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute,

United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812 (1953), nor does it encourage arbitrary and erratic arrests and convictions. *Papachristou v. Jacksonville*, 40 U.S.L.W. 4216, 4218 (U.S. February 24, 1972). The statute unmistakably forbids only a sale by one who though he is "in some manner aware" that the buyer is a nonresident, nevertheless completes a knowing, "calculated" sale. *See Ginsberg v. State of New York*, 390 U.S. 629, 643-44, 88 S.Ct. 1274, 1283 (1968). Under this circuit's recent decision in *United States v. Featherston*, ____ F.2d ____ (5th Cir. 1972) [No. 71-2385 & 71-2687, May 25, 1972], the challenged scienter requirement did not expose Lebman to prosecution without first fairly warning him of the nature of the proscribed conduct. *See, Rowan v. U. S. Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484 (1970). *See also United States v. Decker*, 446 F.2d 164 (8th Cir. 1971).

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By Claudette Triguy
Deputy

JUL 13 1972

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-233

HYMAN LEBMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 11, 1970, an indictment in eighteen counts was returned against petitioner and others in the United States District Court for the Western District of Texas, charging him, *inter alia,* with aiding and abetting a firearms dealer in the unlawful sale and delivery of a Colt Cobra .38 caliber pistol to an out-of-state resident, and the defective and false recording of the transaction, in violation of 18 U.S.C. 922(b)(3), 922(b)(5), and 922(m). On June 21, 1971, petitioner pleaded guilty to these three counts. He was sentenced to concurrent prison terms of one year and fined $1,500. The jail sentences were suspended and petitioner was placed on five years' unsupervised

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probation. Petitioner's motion in arrest of judgment was denied. The court of appeals affirmed (No. 71-2281, decided June 2, 1972) (Pet. App. II). A petition for rehearing was denied on July 5, 1972. The petition for a writ of certiorari was filed on August 10, 1972, and is therefore out of time under Rule 22(2).

In any event, there is no reason to grant the writ. Relying upon *United States* v. *Bass*, 404 U.S. 336, and *Rewis* v. *United States*, 401 U.S. 808, petitioner argues that unless the government alleged and proved that his local firearms sale had an effect on interstate commerce, Congress had no power to regulate the transaction. The court below, in a comprehensive opinion discussing *Bass* and *Rewis*, properly found that Congress intended to regulate the acquisition of firearms without requiring the government to show, in each case, that the particular sale has a nexus with interstate commerce, and that as so enacted this statute is within Congress's power under the Commerce Clause. Cf. *Perez* v. *United States*, 402 U.S. 146. The courts of appeals have uniformly sustained other subsections of the present statutes against this kind of claim. *E.g.*, *United States* v. *Garner*, C.A. 7, No. 71-1626, decided July 27, 1972; *United States* v. *Nelson*, 458 F. 2d 556 (C.A. 5); *United States* v. *Crandall*, 453 F. 2d 1216 (C.A. 1). No substantial constitutional question exists.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE, 1972

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

UNITED STATES SUPREME COURT

NO. 72-233

Hyman Lebman

versus

United States of America

Reply to

United States Memorandum in opposition.

IN THE

UNITED STATES SUPREME COURT.

NO. 72-233

Hyman Lebman
Petitioner

Versus

United States of America

In answer to the Government memorandum as to timely filing, the writ of certiorari was stamped received by the Clerk of the Supreme Court in Washington, D. C. on the 30th day of June, 1972 and thus was filed in time. This was then returned by the Clerk for correction of printing and returned to that office after correction was made and was then docketed under the above number, under authority of rule 39 (4).

A highly controversial constitutional question is raised when the memorandum for the Government in opposition, dated September, 1972, is read.

Therein, the Government takes the position that whenever Congress passes a law and adds thereto its intent, that it

automatically assumes constitutional approval.

Mentioned are some appeal courts in agreement. Not mentioned are those not in agreement, in the appeals court, nor the indications of the Supreme Court in relation to the question.

The Government had, in its original pleadings, claimed the Commerce Clause as its authority and in doing so assumed the responsibility of showing nexus to interstate commerce and proving this factor. Finding itself unable to do so, attempt to "short circuit" its constitutional responsibility by arguing that "congress intended to regulate the acquisition of fire arms and the keeping of records of firearms without requiring the Government to show, in each case, and prove, in each case, that this action had nexus to interstate commerce.

To this, Petitioner disagrees and contends that the intent of Congress does not in its self make a law constitutional.

If the intent of Congress made a law constitutional, it would be axiomatic that no law could be unconstitutional as it is reasonable to assume that every law it passes is the intent of Congress.

Petitoner contends that all law must be within the confines of the Constitution regardless of the intent of Congress. To hold that Congress can decide that any transaction or trade in any item is automatically interstate commerce would be an unwarranted extension of the federal power under the Interstate Commerce Clause.

Declaring intra-state commerce to be interstate commerce simply because of intent without showing and proving an actual burden upon interstate commerce in each case, not only is a wide interpretation of the Constitution but actually a change of the Constitution and Petitioner believes this question should be decided by the United States Supreme Court as to whether the Interstate Commerce Clause is to be interpreted in such a manner.

This law is a relatively new law and there has been a variance of opinions in the appeal courts, with questions of constitutionally remaining unanswered, therefore the Petitioner prays that the write of certiorari will be granted.

Hyman Lebman,
Petitioner.

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